No. 83-5124

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARK A. HOPKINSON,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

ON APPEAL FROM THE
SUPREME COURT OF WYOMING

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

ISSUES INVOLVED AND NATURE OF THE CASE

A. ISSUES

The issues raised are:

I. IS THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE VIOLATED IF THE JURY, IN A RESENTENCING UNDER THE WYOMING DEATH PENALTY STATUTES, IS PERMITTED TO FIND AGGRAVATING CIRCUMSTANCES WHICH THE JURY IN THE PREVIOUS SENTENCING CONSIDERED BUT DID NOT FIND?

II. MAY A STATE DEFENDANT BE PUNISHED BY THE DEATH PENALTY WHERE THAT DEFENDANT IS AN ACCESSORY TO THE MURDER OF WHICH HE IS CONVICTED: AND FURTHER MAY SUCH A DEFENDANT"S CONVICTION BE AGGRAVATED BY THE CIRCUMSTANCE THAT THE MURDER, WHICH WAS COMMITTED BY OTHERS, WAS "HEINOUS, ATROCIOUS OR CRUEL?"

B. PROCEEDINGS.

The Petitioner was convicted in the District Court of four counts of accessory to first degree murder. The State sought the death penalty for all four murders. The jury determined the death penalty to be appropriately applied in only one of those murders. Life sentences were imposed for the other three. The Petitioner appealed to the Wyoming Supreme Court and all four convictions were affirmed. The Wyoming Supreme Court did vacate the death sentence and remanded the case back to the District Court for resentencing. Hopkinson v. State, Wyo., 632 P.2d 79 (1981), certiorari denied 455 U.S. 922 (1982). The resentencing was conducted in the District Court according to the Wyoming Supreme Court's mandate and a second jury imposed the death sentence. The Petitioner appealed the result of the resentencing to the Wyoming Supreme Court, and it is from that Court's mandate of affirmance that Petitioner appeals to the U.S. Supreme Court. Hopkinson v. State, Wyo., 664 P.2d 43 (1983).

C. ARGUMENTS.

I.

THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE IS NOT OFFENDED WHERE THE JURY, IN A RESENTENCING UNDER THE WYOMING DEATH PENALTY STATUTES, IS PERMITTED TO FIND AGGRAVATING CIRCUMSTANCES WHICH THE JURY IN THE PREVIOUS SENTENCING CONSIDERED BUT DID NOT FIND.

Petitioner argues that he was placed in double jeopardy because; (1) evidence relating to the Vehar deaths which came in during the guilt phase was admitted again during the penalty phase; and (2) because the jury was given information relating to statutory aggravating circumstances which were deemed inapplicable during the first sentencing hearing. This argument fails to recognize the purpose of requiring the State to prove aggravating circumstances in capital punishment cases.

a. PURPOSE AND EFFECT OF STATUTORY AGGRAVATING CIRCUMSTANCES.

During the sentencing phase of a capital punishment case, the jury is called upon to examine aggravating circumstances in order to determine whether a defendant should be given the death penalty. The requirement that aggravating and mitigating circumstances should be weighed was incorporated into capital punishment statutes in response to the U.S. Supreme Court decision of Furman v.

Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in which it was held that the death penalty must never be wantonly or freakishly imposed. After Furman was decided, the Georgia legislature devised a sentencing procedure in which, after a finding of guilt, a separate sentencing hearing is held at which the trier of fact determines whether or not the death penalty will be imposed. Before the death penalty may be imposed, at least one of ten statutory aggravating circumstances must be found to exist beyond a reasonable doubt. This procedure was upheld in Gregg v. Georgia, 428 U.S. 153, 162-166, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In Gregg, the Court held that the death penalty was constitutional when imposed in conformance with the Georgia sentencing procedure. The Court approved of the use of a bifurcated proceeding and, more importantly, determined that the Georgia procedure substantially reduced the possibility that the death penalty would be arbitrarily or capriciously applied. Gregg v. Georgia, supra, 428 U.S. at 193-195.

It is clear that the essential purpose and effect of the statutory list of aggravating circumstances is to: (1) provide guidance for the sentencing authority in its consideration of the evidence produced at the sentencing hearing; and (2) to narrow the class of murderers upon whom the death penalty may be imposed. In fact, where these dual ends are met by some other means, there is no need for a statutory list of aggravating circumstances. Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2980 (1976).

Of the aggravating circumstances which were presented to the jury by the State, two require the admission of prior convictions:

> (h) Aggravating circumstances are limited to the following:
>
> (i) the murder was committed by a person under sentence of imprisonment;
>
> (ii) the defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person.
>
> * * *

Section 6-4-102, W.S. 1977.

The recognition that prior offenses are to be viewed as aggravating circumstances therefore presupposes that evidence of prior convictions and the facts surrounding the convictions are properly admitted during the sentencing phase. Information relating to the Vehar murders was not proffered to levy a harsher or additional punishment on Appellant; it was introduced to comply with Section 6-4-102(h), W.S. 1977.

b. SCOPE OF THE ADMISSIBILITY OF EVIDENCE AT THE SENTENCING HEARING.

The list of statutory aggravating circumstances which serves to guide the sentencing authority and narrow the applicability of the death penalty does not narrow the scope of evidence which may be presented at the sentencing hearing. In Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), the Supreme Court recognized the need for admitting the best available information when sentencing is undertaken by approving of the use of evidence

in sentencing which would not be admissible at a hearing directed at determining guilt. In order to properly determine the type and extent of punishment, the sentencing authority in capital cases should have in its possession, "the fullest information possible concerning the defendant's life and characteristics." Id., 337 U.S. at 247.

With a single exception, Williams remains good law. While the Williams court implied that the sentencing procedure need not satisfy the requirements of due process, in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Court made clear that sentencing proceedings may not violate due process. In Gardner, some of the information upon which the sentencing judge based his decision to impose the death penalty was never revealed to counsel for the parties. The defendant was, therefore, prevented from having an opportunity to rebut that information. This procedure was held to be violative of the defendant's right to due process and the sentence was overturned. Id., 430 U.S. at 362. However, Gardner does not otherwise change the import of the Williams decision, because Gardner did not hold that the scope of evidence which is admissible at sentencing proceedings in capital cases should be narrowed. The Supreme Court's approval of the use of all available and relevant information in sentencing is also apparent in Gregg v. Georgia, supra, 428 U.S. at 190-191, 203-204.

An examination of Jurek v. Texas reinforces the position that all relevant information is properly admitted at a sentencing hearing. The Texas statute does not list aggravating circumstances for the sentencing authority to

consider. The Texas statute does, however, require the judge or jury to determine:

> whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

Jurek v. Texas, 428 U.S. at 269, quoting Tex. Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976).

The Court, in observing that this was a difficult determination to make, concluded that it could be done provided that, "the jury [has] before it all possible relevant information about the individual defendant whose fate it must determine." Id., 428 U.S. at 276. The cases make clear that the sentencing authority should have before it all relevant information necessary to determine sentence, that the rules of evidence should not be applied to preclude relevant evidence, and that relevance is determined by looking to the sentencing decision as a whole.

c. SCOPE OF ADMISSIBILITY AND STATUTORY AGGRAVATING CIRCUMSTANCES.

The Supreme Court has approved the admissibility of any relevant information in a sentencing proceeding. The existence of a statutory list of aggravating circumstances does not in itself narrow the scope of what evidence is admissible or relevant. Relevance must be determined with respect to the issue whether a life or death sentence should

be imposed. That issue must be decided by weighing the aggravating and mitigating circumstances present, with the further limitation that a death sentence cannot be imposed if at least one statutory aggravating circumstance is not present. As a practical matter, weighing aggravating and mitigating circumstances presents a task no less difficult than that presented under the Texas procedure described above. Clearly, the judge or jury must have all the evidence necessary to evaluate the individual defendant. They must not be restricted to a narrow set of evidence which applies to specific aggravating circumstances and whichever mitigating circumstances the defense chooses to set out. An adequate, informed decision simply requires that a greater knowledge of the individual be available, than the narrow scope of relevance urged by Appellant would allow.

The statutory aggravating circumstances have their desired effect and serve their constitutionally mandated purpose, regardless of the scope of admissibility of evidence. They serve as standards to guide the judge or jury in evaluating the evidence produced at the sentencing hearing; and, since the death penalty may not be imposed if no statutory aggravating circumstance is present, they serve to narrow and restrict the cases in which the death penalty may be imposed.

d. THE WYOMING SENTENCING PROCEDURE AS APPLIED TO THE CASE AT BAR.

The Wyoming sentencing statutes assure that before a defendant is given the death sentence, the sentencing authority must be given all relevant information in order to

make a reasoned decision. Evidence which may be admitted shall include, but is not limited to, matters relating to any aggravating or mitigating circumstances. Section 6-4-102(c), W.S. 1977. Aggravating circumstances which will be sufficient to justify imposition of the death penalty are limited to those set out in Section 6-4-102(h), W.S. 1977. Nothing in the statutes limits the sentencing authority's ability to consider evidence relevant to the determination of sentence. The Florida statutes approved by the United State Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), parallel the Wyoming statutes in these respects.

In the case at bar, the sentencing jury was presented with evidence of the Petitioner's previous actions which demonstrated a propensity to commit violent acts. The jury was also presented with the detailed evidence of the Petitioner's involvement in another crime, the murder of the three members of the Vincent Vehar family. This evidence clearly had a probative value for the determination of the propriety of the death penalty. The evidence is, therefore, relevant to the sentencing decision and admissible in the discretion of the trial judge.

e. IT IS NOT DOUBLE JEOPARDY TO RECONSIDER AGGRAVATING CIRCUMSTANCES CONSIDERED BUT NOT FOUND BY THE FIRST JURY.

During Petitioner's first sentencing hearing, the jury determined that the two aggravating circumstances set out at Section 6-4-102(h)(v) and (vi), W.S. 1977, did not apply beyond a reasonable doubt to the murder of Jeff Green. At

the second sentencing hearing, these aggravating circumstances were submitted for the jury's consideration. The second jury found that they were present in the Jeff Green murder.

Petitioner contends that resubmission of these aggravating circumstances placed him in double jeopardy in violation of the Fifth Amendment of the United State Constitution. Petitioner has relied chiefly on the cases of Bullington v. Missouri, 451 U.S. 430, 68 L.Ed.2d 270, 101 S.Ct. 1852 (1981); Sanne v. State, 609 S.E.2d 762 cert. den., 452 U.S. 931, reh. den. 453 U.S. 928 (Tex.Cr.App. 1980); and Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), as authority for his position. Those cases are readily distinguished from the case at bar in that, in each of those cases, the state sought imposition of a greater sentence at the second sentencing than had been imposed at the first sentencing. Those decisions held that the state could not seek a greater sentence on rehearing because doing so would place the defendant in double jeopardy. That prohibition is inapposite in the instant case, because the State did not seek imposition of a greater penalty than was imposed at the first sentencing. The issue presented here, whether individual aggravating circumstances rejected at the first sentencing may be reconsidered at the second sentencing, was never addressed in the cases cited above.

The United States Court of Appeals, Ninth Circuit, has considered the precise issue raised by Petitioner. In Knapp v. Cardwell, 667 F.2d 1253 (1982), the Ninth Circuit Court observed that, "[t]he Bullington court did not address the issue of the manner in which individual aggravating circumstances should be treated on resentencing when the

original sentence imposed the death penalty." [emphasis in original.] Id., at 1265. The Knapp court held that there was no implicit "acquittal" of aggravating circumstances which were found not to exist at a previous sentencing hearing. Id., at 1264. They went even further, holding that, "A resentencing hearing at which any evidence of both aggravating and mitigating circumstances is received does not violate appellants' constitutional rights, even if the evidence developed or was discovered after the original sentencing hearing or was not introduced there for some other reason." Id., at 1265.

Clearly, Petitioner was not placed in double jeopardy, nor was he otherwise prejudiced by the sentencing jury's reconsideration of the aggravating circumstances in question.

f. CONSIDERATION OF PRIOR CONVICTIONS TO ENHANCE THE PENALTY IS NOT DOUBLE JEOPARDY.

The Defendant was not being tried again for the Vehar murders or for any other of his former crimes. Those crimes merely served to place him in a category of criminals which are to be more severely dealt with than the ordinary class of criminals. The habitual criminal statutes provide an almost perfect parallel and it has almost uniformly been held that it is not double jeopardy to enhance an instant punishment with a past crime that has already once been punished. Annot., 58 A.L.R. 20, 23-25 (1929); Annot., 82 A.L.R. 345, 348-349 (1933); Annot., 116 A.L.R. 209, 212 (1938); Annot., 132 A.L.R. 91 (1941). Appellant cites absolutely no authority which supports his assertion that

the consideration of prior convictions in the sentencing process constitutes double jeopardy. See, Hopkinson v. State, supra, 632 P.2d at 171.

II.

A DEFENDANT MAY BE PUNISHED BY THE DEATH PENALTY WHERE HE IS AN ACCESSORY TO MURDER BUT DID NOT HIMSELF COMMIT THE MURDER SO LONG AS HIS INTENT TO COMMIT MURDER IS ESTABLISHED BEYOND A REASONABLE DOUBT.

Petitioner has been convicted of the murder of Jeff Green as an accessory before the fact. Hopkinson v. State, supra, 632 P.2d at 88; Section 6-1-114, W.S. 1977. Wyoming may, as a matter of law, ascribe equal responsibility to aiders and abetters for the acts of a principal. Lockett v. Ohio, 438 U.S. 586, 602, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Petitioner argues that there must be proof of culpability, intent, and action in order to impose the death penalty on him as an accessory before the fact, and that the evidence in this case is insufficient to prove any of those elements.

The test of sufficiency of the evidence to support a conviction is a well-established one in Wyoming, and this state's standard closely parallels that applied by the United State Supreme Court when it said:

> . . . the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Leppek v. State, Wyo., 636 P.2d 1117, 1119 (1981). Where matters must be proved, not for conviction, but rather to establish gradation of punishment,

the standard of reasonable doubt also applies. Mullaney v. Wilbur, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

Petitioner contends that there has never been a finding that he commanded the murder of Jeff Green. His conviction for that crime is an established fact. Hopkinson v. State, Wyo., 632 P.2d 79 (1981). In addition, the testimony presented to this jury regarding the circumstances of Jeff Green's death, the evidence of phone calls made by Hopkinson to various parties involved, and other testimony concerning motivation for the murder, could all be considered in deciding the sufficiency of the evidence question presented here.

If Petitioner considers the fact that the principals in this offense have not been tried or convicted (indeed have not been found) as reinforcing his argument that he cannot be punished by execution, he misconstrues the law. The principal need not be tried or convicted for the aider and abetter to be convicted and punished. Linn v. State, Wyo., 505 P.2d 1270, 1275 (1973).

The United States Supreme Court has recently held the application of the death penalty to an aider and abetter of a robbery to be unconstitutional. Enmund v. Florida, ____U.S.____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The court in Enmund repeatedly emphasized the crucial elements of intent to kill, and of an act taken towards killing. Enmund, supra, ____U.S.____, 102 S.Ct. at 3372, 3376, and 3379.

In surveying the laws of the individual states, the Enmund majority found that under any circumstances, about

one-third of the states would permit an accomplice in a felony murder context to be sentenced to death. Id., 102 S.Ct. at 3374. Two things should be noted regarding those facts: first, that Wyoming is one of the states that would, Id., 102 S.Ct. at 3372, n. 5; and secondly, that the present case is not one of felony murder. Hopkinson v. State, supra, 632 P.2d at 156. Petitioner is an accessory before the fact to a murder, not a felony participant wherein a murder has been committed.

The reasoning in Enmund centered around the individual culpability of the appellant there. Enmund, supra, ___U.S.____, 102 S.Ct. at 3377. There were findings that Enmund did not kill or attempt to kill, and the record did not indicate any intent to kill. Id. In the present case, Petitioner's intention to kill was established by the evidence, and that he was convicted of aiding and abetting is conclusive as to his having committed an act toward the killing. The Supreme Court in Enmund held that his culpability would be limited to his participation in the robbery alone, there being no intent to kill or expectation that lethal force would be used. Enmund, supra, ____U.S.____, 1092 S.Ct. at 3372 at 3378. Here, there is no underlying crime, only the murder itself; and the evidence showing Petitioner commanded murder assumes Petitioner anticipated the use of lethal force. Also see, Tison v. State, 129 Ariz. 526, 633 P.2d 335 (1981).

The holding in Enmund may be further distinguished by drawing attention to the death penalty itself. Enmund, supra ____U.S.____, 102 S.Ct. at 3377, 3378. Of the two fundamental justifications, deterrence and retribution, the Enmund majority found neither applicable. Id. No

deterrence was likely, the majority says, because one who does not intend to kill will not be deterred by the penalty for killing, and retribution was inapplicable because punishment as vengeance should be tailored to the personal responsibility and moral guilt of the individual. Enmund, supra, ____U.S.____, 102 S.Ct. at 3378.

The case here is not one of vicarious liability for participation in a robbery, but one where Petitioner aided and abetted, in fact directed, the killing of another human being. The obvious effect of the death penalty in such a case will be to deter others from aiding and abetting murder. The moral guilt and personal responsibility of one who commands another to commit murder clearly justified the death penalty as retribution.

The evidence in this case is clearly sufficient for the jury to have found Petitioner intended the murder, performed an act towards the killing as an accessory, and to determine his culpability was sufficient to impose the death penalty. Petitioner's reliance, therefore, on the holding of Enmund is misplaced, and his contention that the evidence as to any relevant matter is insufficient fails in light of the standards of Jackson v. Virginia, and Leppek v. State.

CONCLUSION

For the reasons set out above, the Court should dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on September 9th, 1983, I served true and correct copies of the attached BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, by placing same in the mail, upon the Supreme Court of Wyoming and to Leonard D. Munker, Wyoming Public Defender, Second Floor, Ellery Building, 1712 Carey Avenue, Cheyenne, Wyoming 82002.

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